

74363-5

FILED
COURT OF APPEALS
DIVISION ONE
MAY 26 2017

74363-5

NO. 74363-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KARL PIERCE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

**APPELLANT'S SUPPLEMENTAL ASSIGNMENTS OF ERROR
AND BRIEF IN SUPPORT**

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A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The trial court erred and violated article IV, section 16 by commenting on the evidence.

2. The trial court denied Karl Pierce's right to a unanimous jury verdict by failing to properly instruct the jury regarding deliberations.

B. ISSUES PERTAINING TO SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. Whether the trial court commented on the evidence in violation of article IV, section 16 when, in a limiting instruction, the court instructed the jury that witness Ray Lyons made oral assertions where it was contested whether Lyons actually made the alleged oral assertions?

2. Whether the trial court's failure to instruct the jury that all deliberations must involve all twelve jurors violated Pierce's constitutional right to a unanimous jury verdict, constituting structural error that requires reversal?

C. ARGUMENT IN SUPPORT OF SUPPLEMENTAL ASSIGNMENTS

- 1. The trial court impermissibly commented on the evidence by instructing the jury that Ramon Lyons made oral assertions, denying Pierce a fair trial.**

At trial, Ramon Lyons denied he had a conversation with Hiram Warrington during the evening after the alleged crime or that Warrington was present for a conversation between Lyons and Pierce during which the

crime was discussed. RP 2659-60. The State was allowed to impeach Lyons's testimony with testimony from Hiram Warrington, over defense objection. RP 2696-2708.

Because the testimony was only for impeachment of Ramon Lyons and only on the issue of whether a conversation between him and Hiram Warrington occurred, a limiting instruction was necessary. RP 2713. The State proposed and the court provided the jury the following limiting instruction:

And, ladies and gentlemen, some of this evidence here, evidence that Mr. Warrington's testified to is being admitted by the Court for a limited purpose.

Testimony regarding any oral assertions made by Ray Lyons to Hiram Warrington may be considered by you only for the purpose of impeaching Ray Lyons' credibility. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

RP 2783; RP 2716-17, 2724.

The defense objected to this instruction, arguing that it commented on the evidence because whether the conversation occurred was in dispute. RP 2713-23. The defense proposed the oral assertions should be referred to as "alleged." *Id.*

Article IV, section 16 of our state constitution does not allow judges to "charge juries with respect to matters of fact, nor comment

thereon.” Const. art. IV, § 16. This provision prohibits a court from “conveying to the jury his or her personal attitudes toward the merits of the case” expressly or impliedly. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006) (quoting *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)). The prohibition on judicial comments on the evidence prevents the jury from being influenced by the trial judge’s opinion of the evidence. *State v. Jacobsen*, 78 Wn.2d 491, 495, 477 P.2d 1 (1970).

A court improperly comments on the evidence if a reasonable juror hearing the statement in the context of the case would see it as creating an inference of the court’s evaluation of a disputed issue. *State v. Hansen*, 46 Wn. App. 292, 300, 730 P.2d 670 (1986).¹ An unconstitutional comment on the evidence can be conveyed to the jury explicitly or by implication. *Jacobsen*, 78 Wn.2d at 495.

It was a question of fact for the jury to determine whether Ramon Lyons made any oral assertions to Hiram Warrington. *See* RP 2722 (defense argument as to same). Yet, the court’s instruction took that question away from the jury by indicating there were oral assertions.

¹ The constitutional question of whether a court commented on the evidence in violation of article IV, section 16 may be raised for the first time on appeal. *Hansen*, 46 Wn. App. at 300; RAP 2.5(a)(3).

“It is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues.” *State v. Crotts*, 22 Wash. 245, 250-51, 60 P. 403 (1900).

The State cannot show that the unconstitutional comment on the evidence did not prejudice Pierce’s right to a fair trial. “Judicial comments are presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted.” *Levy*, 156 Wn.2d at 723.

The court’s instruction commented on the disputed issue of whether Lyons and Warrington spoke about the incident. Warrington testified Pierce was present for one of the conversation, but Pierce denied it. RP 2696-2708, 2780-92, 3281-83. By weighing in on Warrington’s and Lyons’ credibility, the court impugned Pierce’s credibility. He, therefore, could not obtain a fair trial. The conviction should be reversed.

2. The court failed to instruct the jury that deliberations must be the common experience of all the jurors, denying Pierce his right to a unanimous jury verdict.

Pierce had the constitutional right to a trial by jury and to a unanimous jury verdict. Const. art. I, §§ 21, 22.

Our state constitution requires deliberations “be the common experience” of all the jurors. *State v. Lamar*, 180 Wn.2d 576, 585, 327 P.3d 46 (2014) (quoting *People v. Collins*, 17 Cal. 3d 687, 693, 552 P.2d 742, 131 Cal. Rptr. 782 (1976)); *State v. Fisch*, 22 Wn. App. 381, 383, 588 P.2d 1389, 1390 (1979). A unanimous jury verdict is one reached through a common deliberative process. If any one or more jurors fails to participate in any of the deliberations of the other eleven jurors, the resulting verdict is not constitutionally valid. *Lamar*, 180 Wn.2d at 585 (“It is not enough that 12 jurors reach a unanimous verdict if 1 juror has not had the benefit of the deliberations of the other 11.”). In other words, not only must the final vote be unanimous but the consensus must be one reached in a process where all jurors exchange their individual perceptions, experiences, and assessments in a collective environment. *Id.*

Criminal Rule 6.5 embodies this constitutional mandate by requiring that if a juror is replaced with an alternate, the deliberating jury

must “disregard all previous deliberations and begin deliberations anew.” CrR 6.5.

The failure to properly instruct a jury on the necessity of common jury deliberations constitutes manifest constitutional error subject to review for the first time on appeal. *Lamar*, 180 Wn.2d at 585-86.

The trial court’s instructions failed to make clear that deliberations could only occur when all twelve members of the jury are together. The error is presumed prejudicial. *Lamar*, 180 Wn.2d at 588. The State bears the burden to show the error was harmless beyond a reasonable doubt. *Id.*

The court replaced an excused juror with an alternate after the jury had spent about two hours together. RP 3900-28; CP 175-79, 294. Yet, the court did not instruct the reconstituted jury to begin deliberations anew. RP 3928-29; *see State v. Johnson*, 90 Wn. App. 54, 72-73, 950 P.2d 981 (1998); *State v. Ashcraft*, 71 Wn. App. 444, 463, 467, 859 P.2d 60 (1993). And, as discussed, the jurors were not instructed that deliberations could only occur when all twelve jurors were present to ensure that the verdict would be the result of a common deliberative process.

In light of this record, there is a reasonable probability that some jurors discussed the case without all twelve jurors being present. Nothing

told them they could not. The State cannot prove the error harmless beyond a reasonable doubt.

Alternatively, the Court should find the error structural, requiring reversal without a showing of actual prejudice. *Sullivan v. Louisiana*, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). “Structural error is a special category of constitutional error that ‘affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself.’” *State v. Wise*, 176 Wn.2d 1, 13-14, 288 P.3d 1113 (2012) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)). Our constitution requires a verdict be unanimously reached. However, the jury here was not told it needed to deliberate in common and could only deliberate in common. The resulting conviction of Pierce is unconstitutional.

D. CONCLUSION

In addition to the reasons set forth in Pierce’s opening brief, the Court should reverse because the trial court commented on the evidence and Pierce’s right to jury unanimity was violated by the trial court’s instructions.

DATED this 24th day of May, 2017.

Respectfully submitted,

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